NO. 21806

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN MICHAEL OSHATZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

On November 23, 1966, the appellant was indicted in one count, by the Federal Grand Jury for the Southern District of California, Central Division, for a refusal to be inducted into the Armed Services, in violation of Title 50, United States Code App., Section 462 [C. T. 2]. 1/ Following a court trial before the Honorable Jesse W. Curtis, United States District Judge, on January 9, 1967, the defendant was found guilty, and on February 20, 1967, appellant was committed to the custody of the Attorney General for three

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1/ "C. T." Refers to Clerk's Transcript.

years [C. T. 6].

Appellant filed, on February 28, 1967, a timely notice of appeal [C. T. 7].

The District Court had jurisdiction under the provisions of Title 50, United States Code App., Section 462, and Title 18, United States Code, Section 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

APPLICABLE STATUTE

Title 50, United States Code App., Section 462 provides in pertinent part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall,

upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . ."

III

QUESTIONS PRESENTED

A. Whether appellant was properly processed by the Local Board of the Selective Service System.

B. Whether the appellant may raise on appeal a point not raised in the District Court.

C. Assuming appellant can raise on appeal an issue not raised in the trial court, whether he suffered any prejudice by not having had an opportunity to execute a Security Questionnaire.

IV

STATEMENT OF FACTS

Unless otherwise indicated, page references in the Statement of Facts are references to the Selective Service File of appellant, Exhibit One, in evidence.

Appellant registered with Local Board No. 100 on November 4, 1958 (pp. 1, 2).

On October 5, 1959, the Board received from appellant

a completed Classification Questionnaire (Form SSS No. 100) wherein the appellant did not sign the section relating to conscientious objection (p. 6). On September 6, 1961 The Board received from appellant a Form No. 127, Current Information Questionnaire, wherein he in no way noted that he claimed the status or was a conscientious objector (pp. 15-16).

On October 2, 1961, appellant was classified in Class I-A, and was mailed a notice of such classification on Form No. 110 on October 3, 1961 (pp. 3, 11).

On May 22, 1963, The Board received a Current Information Questionnaire from appellant indicating he sold "Hot Dogs and Coke" and in no way indicated he claimed the status of conscientious objector (pp. 18-19).

On June 5, 1963, the appellant reported for an Armed Forces Physical Examination (pp. 17, 21) and was found acceptable (DD Form 62) (p. 20). On July 26, 1963, the Form D. D. 62 was mailed to appellant (p. 11).

On June 14, 1965, The Board received another Current Information Questionnaire from appellant in which he stated he was a self-employed artist and also gave no indication that he claimed the status of conscientious objector (pp. 28-29).

On November 2, 1965, appellant was classified in Class I-A by The Board, and notice thereof was sent to appellant on Form No. 110 on November 8, 1965 (p. 11). No appeal was taken from the above classification (p. 11).

On November 19, 1965, The Board sent appellant an Order

to Report for Induction (SSS Form No. 252) on December 28, 1965 (pp. 11, 30).

On December 1, 1965, The Board received a letter from appellant stating he wished re-classification from I-A to I-O (Conscientious Objector). Appellant also asked for a cancellation of his induction order and for transfer of his local board to New York City (p. 31). On December 9, 1965, The Board sent a notice to appellant that his induction had been postponed, and enclosed therewith was a Form 150 (pp. 11, 33-34). On December 20, 1965, The Board received a completed Form 150 (Special Form for Conscientious Objectors) from appellant (pp. 35-45).

On February 1, 1966, appellant had an interview before The Board, at which time, among other things, he stated that he was not a member of a religious organization although he believed in a Supreme Being; that he did not accept the faith of his parents; that he belonged to no organization, and that he would not accept non-combatant service, but would accept civilian work in lieu of induction. At the conclusion of the interview The Board decided to not reopen the classification of appellant (pp. 11, 64-66). On February 7, 1966, a Form C-140, was sent to appellant by which he was notified that The Board was of the opinion that the facts did not warrant the reopening of his case (p. 68).

On March 1, 1966, The Board sent appellant notice of a new date to report for induction of March 22, 1966 (p. 70). On March 22, 1966, the appellant reported to the Armed Forces Entrance Station and refused to be inducted into the Armed Forces

of the United States (pp. 73-86). After being advised of the criminal penalties involved, he was again advised to submit to induction, and again refused.

Appellant, at the time of his refusal to be inducted was not given a DD Form 98, Security Questionnaire, to execute (p. 73(a)).

V.

A. APPELLANT WAS PROPERLY PROCESSED BY THE LOCAL BOARD.

After appellant received his order to report for induction was the first time that he indicated he wanted to be classified as a conscientious objector. Appellant, in his opening brief ignores this point and its implications. Appellant argues that a prima facie showing was made and, therefore, without the board making a finding upon which a conscientious objector classification could be denied, the board's action was arbitrary, capricious, contrary to law and without a basis in fact.

Appellant's argument ignores the law. Title 32, Code of Federal Regulations, Section 1625.2, controls the board's actions, and, in pertinent part provides:

> "The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts

not considered when a registrant was classified which, if true, would justify a change in the registrant's classification; . . . provided the classification . . . of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

What the Local Board did in its interview of the appellant was to see whether any "change" resulted from 'circumstances over which the registrant had no control."

Page 34 of the Selective Service File shows that the postponement was for the purpose of investigation. If the board were to reopen the classification then the specific finding called for by Section 1625.2 would have to have been made. A light perusal of the Form 150 submitted (p. 35), and the letters submitted (pp. 47-60), and the interview conducted (p. 64), all show that there was nothing new in appellant's thinking.

The Reporter's Transcript, at page 21, shows that appellant's opposition to war "was of long standing."

Appellant claims that he was deprived of the rights of a hearing, reclassification, appeal, etc. A casual knowledge of the Regulations makes it apparent that such things were not available. As this Court said in Dugdale v. United States,

Slip Opinion, p. 3, (9th Cir. February 15, 1968):

> ". . . He was required to show a 'change of status' occurring after receipt of the induction notice. He did not do so." (Footnote omitted.) See Boyd v. United States, 269 F. 2d 607, 609-10 (9th Cir. 1955).

Once the board could not make the specific finding required, it was obligated to do one thing, and that was to send the letter appearing at page 68 of the file, and required by 32, C. F. R., §1625. 4.

B. APPELLANT CANNOT RAISE ON APPEAL A POINT NOT URGED IN THE TRIAL COURT

Appellant cannot raise on appeal a point not raised in the trial court. Osborne v. United States, 371 F. 2d 913 (9th Cir. 1967), cert. den. 387 U. S. 946; Bouchard v. United States, 344 F. 2d 872 (9th Cir. 1965).

There is no reference, shown by appellant as to where he raised, in the trial court, a question as to the appellant's not having been given an opportunity to execute a DD Form 98. If the matter had been raised then the District Court could have considered it and the Government could have introduced testimony with respect thereto. It is this basic unfairness which caused the above-stated rule to have been promulgated in the first place.

Appellant may argue that in his motion for judgment of acquittal filed two days after the trial (C. T. 4), that he raised the instant point. A reading of appellant's motion reveals that it is nothing more than a shotgun blast including everything from failure to "prove a violation of the Act and Regulations" to "the President is acting beyond his powers in using draftees for the Vietnam war."

It is noted that at page 73 of the Selective Service File, there is stated, "Mr. Steven Michael Oshatz, was determined fully qualified for induction in all respects."

C. ASSUMING THE QUESTIONNAIRE POINT MAY BE RAISED ON APPEAL, APPELLANT SUFFERED NO PREJUDICE THEREBY AND IT WAS HARMLESS ERROR.

It is the law of this Circuit that mere technical deficiencies in the entire process will not work to upset a conviction. In Yaich v. United States, 283 F. 2d 613, 620 (9th Cir. 1960), this Court held as follows:

> ". . . Failure to comply with Selective Service Regulations which do not prejudice a registrant are not grounds for upsetting conviction based on disobedience of induction or civilian work. Uffelman v. United States, 9th Cir., 1956, 230 F. 2d 297; Kaline v. United States, 9th Cir. 1956, 235 F. 2d 54."

As of this time, appellant has claimed no prejudice and it is submitted none exists to appellant by virtue of his not having been given an opportunity to execute a Security Questionnaire. The regulation of the Army requiring its execution is only for the protection of the Army and not for that of the registrant.

Appellant cites a case, Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955), for the proposition that Army regulations are to be followed when there are no applicable Selective Service Regulations. Chernekoff, does not, however, hold or imply that mere failure to follow said regulations requires reversal. In Chernekoff the registrant was not asked to take the legendary "one step forward." The Court reasoned that said requirement was for the purpose of giving the registrant one last chance to reconsider his already stated intent to refuse induction. In the instant case the Security Questionnaire requirement is not for the protection of the registrant, but for that of the United States. While the "one step forward" and the physical examination are for the benefit of the registrant, it is inconceivable that the DD Form 98 is likewise. It is interesting to note that at the present time the applicable Army regulation has been changed.

Aside from the fact that appellant has not been prejudiced, he has not even claimed that he would have been ineligible for induction if he had executed the form. Nowhere does he claim that he was or is, a member of the Communist Party or any of the other organizations listed in the subject form.

Yaich, supra, refers to the Selective Service Regulations,

but there is no reason why the holding thereof should not apply to the Army regulations as well. The observation is made that Oshatz did not refuse induction because of the DD Form 98 but because of his professed conscientious objection to war.

VI

CONCLUSION

For the above-stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW